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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BEAVER CREEK LAND & CATTLE, LLC,)
a Utah Limited Liability Corporation,)
)
Plaintiff,)
)
v.)
) Civil Action No. 08-CV-202-J
)
PHILLIP A. WOLF,)
)
Defendant.)

RESPONSE TO DEFENDANT’S MOTION TO DISMISS

The Plaintiff, by and through counsel, and for response to the Defendant’s Motion to Dismiss, states and alleges as follows:

Tucked within the Defendant’s Answer is a caption titled “Motion to Dismiss.” See Paragraphs 15 through 22 of Defendant’s Answer and Motion to Dismiss.

The Motion is defective on the grounds that it fails to reference the statute upon which the Motion is based and also fails to set forth any reason as to why Defendant is entitled to a Motion to Dismiss at this juncture of the case.

The Motion is either a 12(b)(6) motion under the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted or a motion for summary judgment, although it is not delineated as such. However, there is an affidavit of the Defendant accompanying the Answer and Motion.

F.R.C.P. 12(b)(6) Motion to Dismiss

The Complaint clearly states claims upon which relief can be granted. Specifically, the Complaint is for damages arising out of a breach of contract. The Complaint specifically alleges that the Defendant entered into a contract (*see Paragraph 4 of Plaintiff’s Complain*); that the Defendant breached the contract (*see Paragraph 7 of*

Plaintiff's Complaint); and that Plaintiff was injured by the Defendant's breach (*see Paragraph 11 of the Plaintiff's Complaint*).

Defendant's assertion that the Complaint fails to state a claim upon which relief can be granted lacks any legal foundation. The Defendant makes bald assertions that the Plaintiff was "injured...at the devices of their [*sic*] own hands. It appears that Plaintiff is appearing without clean hands". It appears as though Defendant has captioned his affirmative defenses, such as unclean hands, as a Motion to Dismiss. Defendant's factual arguments do not constitute a proper basis for a Rule 12(b)(6) motion.

Likewise, the Defendant's argument that "proposed purchase agreements occur every day. Some close and some do not." does not excuse the Defendant's breach of the contract nor is it relevant to a 12(b)(6) motion. The same argument can be made for the remainder of the arguments of the Defendant in Paragraphs 20 through 22.

In short, the Defendant's arguments are without any legal or factually supported basis.

Summary Judgment

Likewise, if the Defendant's Motion is a motion for summary judgment, he does not comply with the Federal Rules of Civil Procedure in that he does not allege that there are no material issues of fact to be decided.

Furthermore, the affidavit of the Defendant is by and large nonsensical. The Defendant discusses the transaction in vague generalities, apparently placing blame on the U.S. Treasury for his failure to perform.

While all of this may ultimately comprise a portion of the Defendant's defenses, in no way does it explain how or why the Defendant failed to close on the property. For example, Defendant does not explain how or why the U.S. Treasury's alleged failure to send him money is relevant to Plaintiff's claim. The contract at issue does not have any conditions for the Defendant obtaining his money from the U.S. Treasury and Defendant's failure to obtain this money does not excuse his breach. *See Exhibit 1 to the Complaint*.

Ultimately, whether styled as a Rule 12(b)(6) motion to dismiss or a summary judgment motion, Defendant lacks any factual or legal support for his claim. Based upon the foregoing the Defendant's Motion to Dismiss should be denied.

DATED this 27th day of February, 2009.

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